

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACK M. BRANCATO

Claimant

VS.

MID-CENTRAL/SYSCO FOOD SERVICES, INC.

Respondent

AND

**INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA**

Insurance Carrier

)
)
)
)
)
)
)
)
)
)
)

Docket No. 223,363

ORDER

Claimant appeals from the August 6, 1999, Award of Administrative Law Judge Julie A. N. Sample. In the Award, the Administrative Law Judge denied claimant benefits, finding claimant had failed to satisfy the notice requirements of K.S.A. 44-520.

APPEARANCES

Claimant appeared by his attorney, Leah Brown Burkhead of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purpose of this Award.

ISSUES

Did claimant provide timely notice of accident as is required by K.S.A. 44-520?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Claimant sustained accidental injury on January 20, 1997, when his foot became entangled in wrapping plastic and he tripped and fell, injuring his left knee. Thereafter, claimant alleges he arose and went to the break room where he rested. Claimant worked the remainder of his shift and continued working until February 1997, when he went on a vacation. Upon returning from the vacation, claimant was admitted into the hospital for treatment of ulcers. At that time, he also complained of left knee pain. An MRI was performed, and claimant underwent surgery for a partially torn medical meniscus. It has been stipulated by the parties that claimant has an 18 percent permanent disability to the left leg.

The dispute in this matter centers around claimant's alleged conversations with a supervisor by the name of Michael Armstrong. Respondent acknowledges the injury occurred as a co-worker by the name of Larry Watts observed claimant getting caught in the plastic and falling down. Mr. Watts testified that claimant stood back up, said several cuss words and walked away. However, in an April 2, 1997, statement given to Tony Miller, an insurance adjuster, claimant stated that, after falling and injuring his knee, he hobbled over to a cart and rested his leg, and then after talking to Mr. Watts for a second or two, he went into the office and sat down. At the time of preliminary hearing on August 4, 1997, claimant testified that, after falling and injuring his knee, he walked to the break room and on his way out of the break room, after resting for a period, he ran into Mr. Armstrong, his supervisor, and told him of the injury. At the time of regular hearing on May 14, 1999, claimant testified that he ran into Mr. Armstrong on the way into the break room.

Respondent acknowledges claimant advised Frank DeLac, the night superintendent, of the accident on March 24, 1997. An accident report was prepared April 2, 1997, and is part of the record. The accident report, which was signed by claimant, did not mention claimant's discussion with Mr. Armstrong. Where the form questions when the injury was reported to the supervisor, the date March 24, 1997, was filled in.

While providing his statement to Mr. Miller, claimant was asked when he first reported this to the company. Claimant advised that he had just talked to the company about a week before. Again, there was no mention of his alleged conversation with Mr. Armstrong on the date of accident. When claimant was first asked by the insurance adjuster when he suffered the injury, he answered the third week in January. By the preliminary hearing, claimant had identified the specific accident date as January 20, 1997.

Respondent's plant did display workers' compensation notices, advising of the need to immediately report an injury. In addition, respondent's personnel policy and orientation policy require the immediate notification of any injuries to supervisors. The supervisors were instructed, once notified of an injury, that an accident report was to be filled out regardless of how trivial the injury appeared. Contained in claimant's personnel file were

eight additional reports of accident beginning in 1989 and continuing through October of 1992. These accident reports were prepared for items as trivial as splinters in a hand and as serious as back injuries and chemical burns to the eyes. In every instance, the accident report was prepared within seven to eight days of the date of accident. Only in this instance was there a substantial delay between the date of accident and preparation of the accident report.

Mr. Armstrong testified that he had no memory of claimant ever mentioning a knee injury to him. If claimant had mentioned a knee injury, Mr. Armstrong would have ensured that an accident report was prepared. He agreed that it was the company policy that, if an incident was serious enough for the worker to mention, then it was serious enough for an accident report to be prepared.

Claimant also testified that he contacted Mr. Armstrong approximately two weeks after the incident and discussed the knee problem with him. Mr. Armstrong also has no memory of this conversation ever taking place. He testified that, if claimant had approached him at any time regarding a knee injury or with knee complaints, he would have ensured that an accident report was prepared, as that was a strict company policy.

CONCLUSIONS OF LAW

K.S.A. 44-520 requires that notice of an accident, stating the time and place and particulars and the name and address of the person injured, be given to the employer within 10 days after the date of accident. Actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary.

Claimant alleges he provided notice to Mr. Armstrong, a plant supervisor, on the date of accident and again two weeks later. This allegation by claimant is contradicted by Mr. Armstrong, who remembers no such conversation. In addition, the statement claimant gave to Mr. Miller, the insurance agent, fails to mention any conversation with Mr. Armstrong. The accident report prepared on April 2, 1997, and signed by claimant, fails to mention any conversation with Mr. Armstrong. The accident report mentions the incident was reported March 24, 1997.

The Administrative Law Judge found, based upon the credible evidence, that claimant had failed to provide timely notice of accident. The Appeals Board, in reviewing the evidence, agrees, finding that the delay in claimant's notice to respondent violates the provisions of K.S.A. 44-520.

K.S.A. 44-520 does allow an extension of the notice provisions if claimant can show that his failure to notify respondent was due to just cause, whereupon the time is extended to 75 days from the date of accident. If claimant can prove just cause in this instance, then the March 24, 1997, notice to respondent of the January 20 accident would be timely.

Claimant testified in this matter that he was aware he had suffered an injury on the date of accident. He went into the hospital in February and was advised at that time that he needed to undergo surgery for his knee. Even then, claimant did not notify respondent of the impending surgery. Not until March 24, 1997, did claimant advise respondent of the alleged injury.

Although not intended as an exhaustive list, some factors which the Board considers in determining whether just cause exists are:

- (1) The nature of the accident, including whether the accident occurred as a single traumatic event or developed gradually.
- (2) Whether the employee is aware he or she sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether respondent has posted notice as required by K.A.R. 51-13-1.

In this instance, claimant's accident was a single traumatic event on January 20, 1997. Claimant was aware he had sustained an accident as a result of a sudden traumatic event on the job and not through a series of microtraumas. Several witnesses testified that the workers' compensation notices are posted throughout the plant on various bulletin boards. In addition, both Mr. Watts and Mike Purtle testified that the employees are advised at the time of orientation that any injuries, no matter how slight, are to be reported immediately.

In reviewing the evidence, the Appeals Board finds that there was no just cause for claimant to delay reporting the accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated August 6, 1999, should be, and is hereby, affirmed, and claimant is denied an award against the respondent for the injuries suffered on January 20, 1997.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Leah Brown Burkhead, Mission, KS
Mark E. Kolich, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director